THE VALIDITY OF VIRTUAL ATTACHMENTS:

CONVEYING STANDARD TERMS AND

CONDITIONS TO A CONTRACT VIA THE INTERNET

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Dilbert to Dogbert: "I didn't read all of the shrinkwrap license on my new software until after I opened it. Apparently I agreed to spend the rest of my life as a towel boy in Bill Gates' new mansion." Dogbert to Dilbert: "Call your lawyer." Dilbert to Dogbert: "Too late. He opened software yesterday. Now he's Bill's laundry boy."[1]

The explosive growth of the Internet and eCommerce has presented new and exciting opportunities for both economic growth and streamlined commercial sales. Those new and exciting opportunities are accompanied by equally as new but infinitely more complicated (and frightening) possibilities for electronic shortcuts that clients find appealing as cost-saving measures. One of the newest trends in that regard is to use the Internet to convey the standard terms and conditions of a contract, be it a purchase order or invoice, rather than physically printing the standard terms and conditions on the reverse side of the invoice or attaching them to the contract itself. A process that is often referred to as "virtual attachment."

This article focuses on the validity of virtual attachments and provides a survey of the case law that has addressed the same. The backdrop for that discussion is the case law surrounding the various types of "E"greements, i.e. clickwrap, shrinkwrap, and browsewrap licenses[2], and traditional principles of contract law. The fruit of the discussion is a series of

[1] Scott Adams, Dilbert, United Feature Syndicate, Inc. (June 7, 1997).
[2] The term license is used interchangeably with the term contract for the purpose of this discussion.

practical guidelines that can be used to advise clients exploring the possibility of virtual attachments.

I. Virtual Contracting

The majority of the case law available that addresses the validity of virtual contracting addresses the validity of the various types of Internet contracts that have been devised since the advent and explosion of the Internet. The three main types of virtual contracts, i.e. "E"greements, are: (1) clickwrap, (2) shrinkwrap, and (3) browsewrap licenses.[3]

(1) Clickwrap Licenses

Clickwrap licenses are agreements that present the user of a given website with a message on the computer screen that requires the user to take an affirmative action to consent to the terms and conditions of the website prior to viewing the content of the website and/or purchasing any products. For example, the user will be confronted with a window that outlines all the terms and conditions of the license and then a question as to whether the user accepts all the terms and conditions thereof. In order to proceed, the user is forced to elect, and click, on an icon providing that they do, in fact, agree. If the customer chooses "no" or does not agree to the terms of the license, the process is terminated. The following is an example of a typical clickwrap agreement:

To accept the terms of service, click **I accept**. Clicking "I accept" means that you agree to the terms of the service agreement and privacy statement. You understand that you are creating credentials that you can use on other **xxxxx** sites and services, you agree to receive required notices from **xxxxx** electronically, and you

[3] For a general discussion see author's artcle *Shrink-wrap, click-wrap agreements enforceable*, The Iowa Lawyer, Vol.64, No. 1, Jan. 2004, pg. 22.

agree to receive targeted advertisements and periodic member e-mails. If you do not agree to these terms, click Cancel.

I Accept

Courts that have examined clickwrap licenses have found them to be generally enforceable, provided that none of the terms and conditions contained the license are unconscionable or otherwise violative of traditional contract principles.[4] This is because clickwrap licenses remove many of the factual questions of whether the user had adequate notice of the terms and conditions of the license and manifested assent to the same. The user has to take affirmative action to proceed with the process thereby obviating the concerns about lack of assent. That is not to say that the seller must provide actual notice that the buyer or user has actually read the terms and conditions. In *Home Basket Co., LLC v. Pampered Chef, Ltd.*, 2005 WL 82136 (D.Kan. Jan. 12, 2005), the plaintiff challenged the validity of the standard terms and conditions available on defendant's online ordering system. The system, essentially operating as a clickwrap system, required the plaintiff/seller to go onto defendant's website to initiate a purchase order. *Id.* As part of this process, the seller was asked to accept the purchase order which prompted a pop-up window which noted to the user that by accepting the purchase order they were also consenting to the terms and conditions contained on the website. *Id.* The court analyzed the dispute under traditional contract offer and acceptance principles and determined that by accepting the purchase order, the seller had also accepted the terms and conditions on the website. *Id.* The court noted that "it is a well-established rule of law that contracting parties have a duty to learn the contents of a written contract before signing it, and such a duty includes

[4] For additional discussion about the enforceability of clickwrap agreements *see* William Condon, Jr., *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U.L. REV. 433 (2003/2004).

reading the contract and obtaining an explanation of its terms." *Id*. The court went on to note that "the negligent failure of a party to read the written contract entered into will estop the contracting party from voiding the contract on the ground of ignorance of its contents." *Id.* In those instances where a court has found a clickwrap license to be unenforceable, the analysis has generally focused on procedural or substantive unconscionability and/or the doctrine of contracts of adhesion, rather than the validity of the license itself.

Cases upholding the enforceability of clickwrapagreements:

i-Systems, Inc. v. Softwares, Inc., 2004 WL 742082 (D.Minn. March 29, 2004); i.*Lan Sys., Inc. v. Netscout Serv. Level Corp*., 183 F.Supp.2d 328, 338 (D.Mass 2002) (holding that a valid contract was created when the plaintiff made its clickwrap acceptance and not when it agreed to ship pursuant to the purchase order); *Caspi v. Microsoft Network, LLC*, 732 A.2d 528 (N.J.App. Div. 1999) (upholding the validity of the forum and venue selection provision of a clickwrap agreement because the users had adequate notice of the term as each user was free to scroll through and read the terms of the license prior to agreeing to the contract); *Forrest v. Verizon Communications, Inc*., 805 A.2d 1007 (D.C. 2002) (upholding the forum and venue selection provision of a clickwrap agreement and dismissing plaintiff's contention that because only a portion of the agreement was visible in the window, he did not receive adequate notice of the forum selection clause); *DeJohn v. The .TV Corporation Int'l*, 245 F.Supp.2d 913 (N.D.Ill. 2003).

Cases rejecting the enforceability of clickwrapagreements:

Williams v. America Online, Inc., 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001) (refusing to enforce the terms of a clickwrap license where the damage done by the defendant's software had already been done prior to the plaintiff accepting the terms and conditions of the clickwrap agreement and further noting that the default "I Agree" setting that forced a user to click on the "Read Now" icon twice before the standard terms and conditions would present themselves did not provide reasonable notice).

(2) Shrinkwrap Agreements

Shrinkwrap agreements get their name from the fact that they are most commonly packaged in a wrapper with software. These agreements inform the user that the use of the software is subject to the terms and conditions of the license agreement on the inside of the package and further that failure to return the product within a certain period of time constitutes

acceptance of the terms and conditions of the license. These licenses are uniformly used to dictate the sellers' terms to the purchaser. As software has become increasingly available online, software retailers began to incorporate their shrinkwrap licenses onto their websites. Some courts have continued to use the term "shrinkwrap license" when referring to this online version while others have turned to analyze the online version as a clickwrap license or a browsewrap license. In the online version of a shrinkwrap agreement, as with the physical version, the user is expressly told of the existence of the license and where its terms and conditions can be found and told if they choose to proceed with any activity in the website, be it purchasing a product or simply browsing, they are bound by the terms of the license. The seminal difference between the shrinkwrap license and the clickwrap license is that the user is not forced to manifest assent by clicking on an icon. Rather, the process of installing the software constitutes acceptance of the terms and conditions.

The legal analysis of shrinkwrap licenses is highly fact intensive and often leads to results which appear to be in conflict with each other. For example, in the seminal shrinkwrap case, *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991), the Third Circuit held that the terms of a shrinkwrap license were not enforceable because contract formation had taken place at the time the order was made and the terms in the shrinkwrap license were therefore nothing more than proposals for additional terms under UCC 2-207. Because the terms of the shrinkwrap license materially altered the contract they were not automatically added to the contract and since the plaintiff had never manifested assent to those terms, they were not part of the contract. *Id.* In contrast, in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), the Seventh Circuit held that the terms of a shrinkwrap license were applicable to the purchase of a consumer software program from a retail store. Under the Seventh Circuit analysis, the software

manufacturer was the offeror and had proposed contract to the buyer that the buyer would accept by using the software after having had an opportunity to read the license. *Id.* When the buyer used the software, he accepted the license and created a contract that included the terms of the shrinkwrap license. *Id.* Additionally, in *Oestreicher v. Alienware Corp*., 502 F.Supp.2d 1061 (N.D.Cal. Aug. 10, 2007) the plaintiff purchased products from the defendant over the Internet. The plaintiff later challenged the validity of the standard terms and conditions that were available on the defendant's website. The defendant contended that the plaintiff was necessarily aware of the standard terms and conditions because he would have encountered multiple hyperlinks to the standard terms and conditions during the ordering process, i.e. a typical shrinkwrap license process. *Id.* The plaintiff countered by alleging that he was unfairly surprised by the presence of an arbitration clause in the standard terms and conditions because the defendant did not "require consumers to access or review the arbitration agreement to effectuate a purchase." *Id.* The court rejected the plaintiff's position noting that the "assertion that companies are required to ensure that customers actually read contracts before agreeing to them" has never been a legal rule in the United States. *Id.* It must be noted that, in analyzing shrinkwrap licenses, courts are often prone to look to the equities of the situation and therefore it is difficult to define the parameters of how far such precedent reached. In those instances where shrinkwrap licenses have been found unenforceable since *Step-Saver* and *ProCD*, it has generally been on substantive unconscionability grounds.

Cases upholding the enforceability of shrinkwrap licenses:

Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) (holding that consumers were bound by the terms of the shrinkwrap license by reasoning that the defendant had shipped computers to the plaintiff with an "accept or return offer" and that by accepting and keeping the product past the 30 day return period, the plaintiffs had accepted the offer and additionally holding that consumers could protect themselves by requesting a copy of the terms before purchase, consulting public sources such as computer magazine and

websites and inspecting the documents and returning the computer if they found the terms unacceptable)[5]; *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (App. Div. 1998) (upholding, with the exception of a singular substantive unconscionable term, the terms of a shrinkwrap license because the plaintiff had retained the product after having had an opportunity to read and review the terms of the license); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc*., 85 F.Supp.2d 519, 527 (W.D.Pa. 2000); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000);

Cases rejecting the enforceability of shrinkwrap licenses:

Arizona Retail Sys. v. Software Link, Inc., 831 F.Supp. 759 (D.Ariz. 1993) (following the *Step-Saver* analysis and holding that contract formation had taken place prior to the shrinkwrap license such that the license became proposals for additional terms of the contract to which the plaintiff never manifested consent); *Klocek v. Gateway 2000 Inc*., 104 F.Supp.2d 13 (D.Kan. 2000) (applying the *Step-Saver* analysis and ruling that the consumers' mere retention of the computer could not be deemed assent to the new terms because express assent cannot be presumed by silence or a mere failure to object); *Rogers v. Dell Computer Corp.*, 138 P.3d 826 (Ok. 2005) (applying the *Step-Saver* analysis and holding that there was insufficient evidence to prove that the plaintiff had manifested an intent to be bound by the new terms proposed by the defendant's shrinkwrap license).

(3) Browsewrap Agreements

Browsewrap agreements are the least intrusive to the online consumer, and therefore the most likely to be found to be unenforceable on grounds of lack of reasonable notice and assent.[6] There are three important differences between browsewrap and clickwrap agreements: (1) in the case of clickwrap agreements, users have constructive notice of the terms of the agreement because they are presented with all the terms prior to entering into the agreement whereas in browsewrap agreement the terms of the agreement are displayed to the users only if they click on the hyperlink that brings up the terms and conditions page; (2) in order to carry out their primary

[5] The Seventh Circuit decision in *Hill v. Gateway 2000, Inc.* has been sharply criticized. *See* Sajida A. Mahdi, *Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. and the Enforceability of Arbitration Clauses included in Standard Form Contracts Shipped with Goods*, 96 NW. U.L. REV. 403, 418 (2001); Kristin Johnson Hazelwood, *Let the Buyer Beware: The Seventh Circuit's Approach to Accept-or-Return Offers*, 55 WASH & LEE L. REV. 1287 (1998); Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 352 (1999); Christopher Pitet, *The Problem with "Money Now, Terms Later": ProCD, Inc. v. Zeidenberg and the Enforceability of "Shrink-wrap" Software Licenses*, 31 LOY. L.A. L. REV. 325, 327 (1997).

[6] For a more in depth discussion, *see* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U.L. REV. 429, 493 (2002).

purpose with a clickwrap agreement, the users must acknowledge the presence of both the clickwrap agreement and the displayed terms by clicking on a button whereas in a browsewrap agreement, users can carry out their primary purpose without ever clicking on the hyperlink to the terms and conditions or even ever seeing the agreement or its terms; and, (3) in a clickwrap agreement, the user is expressly informed that a contract is being formed whereas in a browsewrap agreement, the user may not even realize that they are forming a contract.[7] In short, the agreement is simply there is the user wishes to view it, provided they can find it.

Courts have been very reluctant to uphold any type of browsewrap agreement. The leading case on the enforceability of browsewrap agreements is *Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585 (S.D.N.Y. 2001). In Specht, the plaintiff had used the defendant's free software download and later alleged that it had been used to obtain web usage information in violation of his privacy. The defendant's browsewrap agreement included an arbitration clause. As with all browsewrap agreements, the software could be obtained without ever having to examine the terms and conditions which could be viewed only through the use of a hyperlink on the main web page but rather merely stated "please review and agree to the terms of the Netscape Smart Download software license agreement before downloading and using the software." The court ruled that the browsewrap agreement was not an enforceable contract because the agreement, if noticed, remains optional to the user and there was no evidence that the user even knew they were creating contract by using the software. As with all other types of "E"greements, each case involving browsewrap agreements is highly fact intensive and the outcomes are often at least in party dependent on the equities of the situation at hand.

[7] For further discussion of the differences, *see* Kaustuv M. Das, *Forum-Selection Clauses in Consumer Clickwrap and Browesewrap Agreements and the "Reasonably Communicated" Test*, 77 WASH L. REV. 481, 499 (2002).

Cases upholding the enforceability of browsewrap licenses:

Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004) (upholding the validity of a browsewrap agreement in the face of a preliminary injunction challenge because of the frequency with which the defendant used the plaintiff's website and presence of evidence that it, in fact, had knowledge of the terms and conditions contained in the browsewrap agreement); *Southwest Airlines Co. v. BoardFirst, LLC*, No. 06-0891, memorandum opinion (N.D. Tex. Sept. 12, 2007) (likening the case to *Verio* rather than *Specht* in that the defendant had actual knowledge of the terms and conditions of the plaintiff's website).

Cases rejecting the enforceability of browsewrap licenses:

Comb v. PayPal, Inc., 218 F.Supp.2d 1165 (N.D.Cal. 2002), aff'd 306 F.3d 17 (2d Cir. 2002) (holding that the browsewrap agreement was unenforceable on both procedural and substantive unconscionability grounds).

II. General Contract Principles Governing the Validity of Virtual Attachments

Because contracting via the Internet is, just that, contracting, the ultimate determination about whether a virtual attachment is or is not effective to form contract will turn on traditional contract principles. The two doctrines that are central to the analysis of internet contracts are: (1) assent and (2) incorporation.

(1) Assent[8]

All contracts must contain mutual assent. *Heartland Express, Inc. v. Terry*, 631 N.W.2d 260, 268 (Iowa 2001). The "mode of assent is termed offer and acceptance." *Id.* (quoting *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 285 (Iowa 1995)). An offer is a " 'manifestation of willingness to enter into a bargain ...'. " *Anderson*, 540 N.W.2d at 285 (quoting Restatement (Second) of Contracts § 24 (1981)). A binding contract requires an acceptance of the offer. *Heartland Express, Inc.*, 631 N.W.2d at 270 (citing *Magnusson Agency v. Pub. Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 26 (Iowa 1997)). Acceptance of the offer is indicated by a " 'manifestation of assent to the terms thereof made by the offeree in a manner

[8] For additional discussion about the concept of assent in Internet contract formation *see* Melissa Robertson, *Is Assent Still a Prerequisite for Contract Formation in Today's E-Conomy?*, 78 WASH. L. REV. 265 (2003).

invited or required by the offer.' " *Id.* (quoting Restatement (Second) of Contracts § 50). Mutual assent is based on objective evidence, not the hidden intent of the parties. *Schaer v. Webster County*, 644 N.W.2d 327, 338 (Iowa 2002) (citations omitted).

Assent to the terms and conditions of a contract are essential to the determination of whether a virtual attachment is valid, i.e. the buyer has to know of the terms and conditions, not actually read them, or of where they can be found, before he or she can be considered to have assented to be bound. For example, in *Jones v. Tread Rubber Corp.*, 199 F.Supp.2d 539 (S.D.Miss. 2002), the district court refused to apply the standard terms and conditions purportedly applicable to a contract where the defendant had "submitted no competent evidence…to show that plaintiff at any time executed an agreement containing the arbitration clause." Rather than having the discussion about standard terms and conditions during negotiation, the defendant merely provided the court with a printed version of its standard terms and conditions from its website. *Id.* The court noted that "the 'Standard Terms and Conditions' document…does not contain the plaintiff's signature or initials or otherwise indicate that the plaintiff reviewed or agreed to the document." *Id.* Likewise, in *MBNA America Bank, N.A. v. Nelson*, 2007 WL 1704618 (N.Y.City Civ. Ct. May 24, 2007), a credit card consumer challenged the applicability of plaintiff's standard terms and on notice and fairness grounds. The court held that the plaintiff/credit card company bore the burden of proving and tendering the actual provisions that the defendant agreed to, including any and all amendments, and not simply a "photocopy of general terms to which the credit user may currently demand debtors agree." *Id.* In so holding, the court noted that the copy of the standard terms and conditions the plaintiff provided did not contain any name, account, number or "other identifying statements which would connect the proffered agreement" with the defendant. *Id.* The court did, however, hold,

that the notice requirement could be demonstrated by presenting "the physical card itself or some solicitation agreement with [defendant's] signature referenc[ing] the terms and conditions," or proof that the terms and conditions were made "readily accessible to [defendant] by e-mail or the internet, and [defendant] was in fact aware of this." *Id.* In short, the courts have held what should have already been obvious, a contracting party cannot assent to terms and conditions unless they are, at the very least, told where they can be found and the party seeking to enforce the contract needs to be able to prove that the buyer consented to the terms, not just that they are generally available.

(2) Incorporation

The ultimate question of the validity of incorporation, whether online or otherwise, is one that is decided under state law under the doctrine of incorporation. Under the doctrine of incorporation, an extrinsic document becomes part of the contract by reference to that document in the contract. *See, e.g., Longfellow v. Sayler*, 737 N.W.2d 148 (Iowa 2007); *Hofmeyer v. Iowa Dist. Ct.*, 640 N.W.2d 225, 228 (Iowa 2001). The reference must be clear and specific and generally must demonstrate an intent by both parties to be bound by the terms of the referenced documents. *See In re Estate of Kokjohn v. Harrington*, 531 N.W.2d 99, 100-01 (Iowa 1995);*Clarendon America Ins. Co v. 69 West Washington Management, LLC, 2007 WL 1745634 (Ill App. 2007); Hopfenspirger v. West,949 So.2d 1050 (Fla. App. 2006)*. Whether a given incorporation is effective or not is a question of law to be decided by the court. *See Hofmeyer*, 640 N.W.2d at 228. As a general rule, physical attachment of the incorporated document is not necessary for the incorporation to be valid. *See, e.g., United California Bank v. Prudential Ins. Co. of America*, 681 P.2d 390, 420 (Ariz. App. 1983).

The validity of an incorporation is often at the heart of whether standard terms and conditions found on a company's website will be upheld. For example, in *Manasher v. NECC Telecom*, 2007 WL 2713845 (E.D.Mich. Sept. 18, 2007), the plaintiffs directly challenged whether or not the incorporation of the defendants terms and conditions from its website was valid. The second page of the defendant's invoice contained five boxes with five statements. *Id.* The one at issue in the case was the box which said: "(5) Agreement (Disclosure and Liabilities)" and provided that "NECC's Agreement 'Disclosure and Liabilities' can be found online at www.necc.us or you could request a copy by calling us at (800) 766-2642." *Id.* The court found that the statement was insufficient to incorporate the terms and conditions from the defendant's website into the contract. *Id.* The court held that "[t]he language does not betray a clear intent that the Disclosure and Liabilities Agreement be considered part of the contract between the parties…[n]othing in the statement clearly indicates that the Disclosure and Liabilities Agreement applies to the service contract between the parties, that it forms any part of the agreement between the parties, or that it is intended to be incorporated to the agreement between the parties." *Id.* The court went on to note that the lack of incorporation was further supported by the fact that the "the statement is the last of five statements, written in plain text, on the second page of the invoice." *Id.* An effective incorporation is therefore the single most important key to making sure that virtual attachments to contracts are enforceable.

III. Virtual Attachments to Contracts

The concept of virtual attachments is still in its infancy and the parameters of the enforceability are still not clear, however, the general contract principles discussed above continue to be the guiding light for courts examining the validity of such attachment and the case law on the various types of "E"greements provides the backdrop for how courts view contracting

in the virtual world. What follows is a summary of the most relevant case law addressing the validity of virtual attachments of standard terms and conditions.

(a) In *Crawford v. Talk America, Inc.*, 2005 WL 2465909 (S.D.Ill. 2005), a customer challenged the applicability of the arbitration provision of her long-distance telephone contract. The customer had been informed, both via the telephone during the ordering process and in a "welcome letter," that she could view the service terms and conditions of her long distance contract on the defendant's website or could "call, email or write a letter to [the defendant] if she had any questions." The district court upheld the applicability of the arbitration provision. The court reviewed other cases involving arbitration provisions and noted that "the facts of this case…are identical except that here the consumer has to go online or make a phone call to learn the terms of the [customer service agreement]." The court went on to note that this fact was "legally indistinguishable." The court rejected plaintiff's argument that it was onerous to expect her to own a computer and learn how to surf the Internet in order to learn the terms of the agreement. The court noted that the plaintiff was savvy enough to sign up for the service and cited the fact that the defendant had offered other avenues via which she could have obtained the standard terms and conditions, i.e. via regular mail or phone, as the basis for the rejection.

(b) In *2nd Story Software, Inc. v. Naviant, Inc.*, an unpublished opinion on the Defendant's Motion to Dismiss (N.D.Iowa March 25, 2003), which is appended to these materials, the defendant challenged the venue and forum selection provisions of his contract with defendant. The venue and forum selection provisions were available on the

defendant's website and were incorporated by reference on the face of the invoice with the following language:

> BY MY SIGNATURE BELOW, I ACKNOWLEDGE I HAVE READ, UNDERSTAND, AND AGREE TO THE TERMS AND CONDITIONS LOCATED AT http://www.edirect.com/terms.html, INCORPORATED BY REFERENCE HEREIN.

Applying traditional principles of incorporation in contract law, the district court held that the venue and forum selection provisions were applicable noting that "the invoices state clearly at the bottom that the Terms and Conditions are incorporated therein by reference and make specific reference to the location of the Terms and Conditions on the Internet." The defendant's motion to dismiss for lack of jurisdiction was denied.

(c) In *Briceno v. Sprint Spectrum*, L.P., 911 So.2d 176 (Fla.App.3rd. 2005), the plaintiff/customer challenged whether an arbitration provision contained in a standard cell phone package applied to her. The customer argued that she had never been given a physical copy of the terms and conditions. In finding that the arbitration clause was applicable to the Plaintiff, the court noted that it was undisputed that she had access to the terms and conditions on the Internet and the location was conspicuously noted on the front of her invoice. The court held that the customer had "a fair and clear warning of changes, conspicuously given on the first page of her invoice" and therefore there was no unfair surprise with respect to the terms and conditions or any changes therein.

(d) In *Rockwood Automatic Machine, Inc. v. Lear Corp*., 831 N.Y.S.2d 349 (Sup. N.Y. Ct. 2006), the plaintiff/buyer brought at action against the defendant to compel arbitration pursuant to a clause contained in its standard terms and conditions. The plaintiff's purchase order stated that it was "subject to and includes terms and conditions which may be accessed via the internet at [company website]" and that "invoicing against

this order for payment shall constitute binding acceptance by you of these terms and conditions." The court never reached the issue of the validity of the incorporation of the terms and conditions available on the Internet but rather determined that whether the arbitration clause was applicable to the dispute was an issue that had to initially be submitted to an arbitrator under New York law.

(e) In *International Star Registry of Illinois v. Omnipoint Marketing, LLC*, 2007 WL 824126 (S.D.Fla. 2007), the defendant brought a motion to dismiss a contract dispute brought in Illinois on the ground that a forum selection clause contained in the defendant's standard terms and conditions required that the dispute be litigated in Florida. The defendant's invoices contained the following language "[b]y my signature below, I certify that I have read and agree to the provisions set forth in this invoice and to the terms and conditions posted at [company website]." The Florida District Court agreed with the Illinois District Court that the choice of law provisions in the contract were applicable because the "choice of law clause was incorporated by reference into those invoices which were signed and reference the terms of the website." It is important to note, however, that the court refused to consider the validity of any invoice which was not signed by the plaintiff.

(f) In *Johnson Controls, Inc. v. TRW Vehicle Safety Systems, Inc.*, 491 F.Supp.2d 707 (E.D.Mi. 2007) the plaintiff brought a breach of contract action against the defendant. The purchase order contained language that the purchase order was governed exclusively by Johnson Controls' Global Terms of Purchase [available at the company's website] or by calling [company phone number] and incorporated by reference." The defendant never specifically challenged the validity of the incorporation by reference but

the court seemed to accept as a given that the reference to the website was sufficient to incorporate the standard terms and conditions therein.

While the case law discussed above addresses contract formation via the use of virtual attachments, as such vehicles become more prevalent, the ability of the contracting parties to alter the terms of the contract, and the ease with which it can be done in the virtual world, has also become a concern. The Ninth Circuit addressed the issue directly *Douglas v. U.S. Dist. Court for the Central Dist. Of California*, 495 F.3d 1062, (9th Cir. 2007). In *Douglas*, an existing customer challenged the validity of a unilateral change to the standard terms and conditions of his already existing long-distance service contract. *Id.* The defendant not only made the change unilaterally, but also failed to provide any notice to the customer that a change had been made. *Id.* Therefore, the only way the customer would have become aware of the change was to view the terms and conditions online and compare them to those he had already received. *Id.* The Ninth Circuit held that "parties to a contract have no obligation to check the terms [of a contract] on a periodic basis to learn whether they have been changed by the other side." *Id.* The court went on to hold that the changed provisions were not applicable to existing customers. *Id.* In so holding, the Ninth Circuit contrasted this case with cases where customers were notified by mail of the change in the terms and conditions and/or that the changes (specifically) were available and could be viewed online. Douglas clearly stands for the proposition that just because the Internet can be used as a vehicle to convey the standard terms and conditions to a contract, it does not give the seller *cart blanch* to unilaterally change the terms of the contract at will.

III. The Take Home Message: Practical Steps to Ensuring the Enforceability of Virtual Attachments

So, what is the practical effect of this discussion on the client who wants to use the Internet to convey the standard terms and conditions of its purchase orders or invoices? The first and most practical message is that the world of Internet contracting is in its relative infancy and the parameters of what is acceptable and what is not are still being developed. That being said, there are some practical steps that clients can take to increase the likelihood that their virtual attachment will be enforceable.

(1) The incorporation of the virtual attachment on the purchase order or invoice must be clear and unambiguous. For example, the reference should be located conspicuously, e.g. different font, underlined, bold, on the front of the invoice and should clearly indicate both the location of the terms and conditions and that the acceptance of the agreement is expressly subject to those terms and conditions. For example:

> **THIS PURCHASE ORDER IS SUBJECT TO AND INCLUDES TERMS AND CONDITIONS WHICH MAY BE ACCESSED VIA THE INTERNET AT [COMPANY WEBSITE] WHICH ARE HEREBY INCORPORATED BY REFERENCE AS IF SET FORTH VERBATIM. THE TERMS AND CONDITIONS ARE ADDITIONALLY AVAILABLE BY CONTACTING [COMPANY] AT [COMPANY PHONE NUMBER] OR [COMPANY MAILING ADDRESS]. ACCEPTANCE OF THE PRODUCT [OR IN THE ALTERNATIVE, SIGNATURE BY THE BUYER] SHALL CONSTITUTE BINDING ACCEPTANCE BY YOU OF THESE TERMS AND CONDITIONS.**

Or

> **THIS PURCHASE ORDER IS GOVERNED EXCLUSIVELY BY THE STANDARD TERMS AND CONDITIONS AVAILABLE AT [THE COMPANY'S WEBSITE] OR BY CALLING [COMPANY PHONE NUMBER]. THOSE STANDARD TERMS AND CONDITIONS ARE HEREBY INCORPORATED BY REFERENCE AND BUYER HEREBY AGREES TO BE BOUND BY THE SAME.**

(2) The terms and conditions need to be available through alternate routes in addition to the Internet. For example, the invoice should provide that the terms and conditions can be accessed via the Internet AND by contacting the company directly.

Provide clear instructions for how to obtain them through the alternate routes.

(3) Best practice would be to have some kind of verification that the customer has received actual notice of the location of the terms and conditions and affirmatively assents to being bound thereby. For example, (i) do a postal mailing to each vendor at the beginning of the program, each update to the terms and as part of the new vendor package; (ii) requiring a signature or initials on the invoice next to the incorporation verbiage will provide additional protection against a buyer's allegations of lack of notice later. The following language has been found to be adequate acceptance of online terms and conditions:

> **By my signature below, I acknowledge I have read, understand, and agree to the terms and conditions located at [company website], incorporated herein by reference.**

(4) The location of the terms and conditions on the website must be clear and easy to locate. A specific page with a dedicated URL is the best way to ensure that the notice requirement has been satisfied but if that is not possible a conspicuous hyperlink on the company's webpage may suffice.

(5) The seller cannot and should not unilaterally modify the online terms and conditions without giving actual written notice to the buyers of the change and giving each buyer and opportunity to assent to or back out of the contract. Any notice of changes in the standard terms and conditions should not just note that changes have occurred but should describe in detail the changes that have occurred.